

Toward a Theory of Strict "Claim" Liability: Warranty Relief for Advertising Representations

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Over a half century ago, the Washington Supreme Court, in *Baxter v. Ford Motor Company*,¹ recognized the pervasive effect of advertising on the expectations of consumers as to product quality. The court held that representations made in promotional literature could create warranty liability even without privity of contract between the manufacturer and the ultimate retail purchaser.² In doing so, the court noted that drastic changes in the marketplace sometimes made traditional contract concepts unacceptable in allocating the risk of loss when product failures caused injury. The court wrote:

Since the rule of caveat emptor was first formulated, vast changes have taken place in the economic structures of the English speaking peoples. Methods of doing business have undergone a great transition. Radio, billboards, and the products of the printing press have become the means of creating a large part of the demand that causes goods to depart from factories to the ultimate consumer. It would be unjust to recognize a rule that would permit manufacturers of goods to create a demand for their products by representing that they possess qualities which they, in fact, do not possess, and then, because there is no privity of contract existing between the consumer and the manufacturer, deny the consumer the right to recover if damages result from the absence of those qualities. . . .³

The establishment of express warranty liability through advertising representations raises several issues, beyond privity, which stretch traditional contract theory analysis and demand creative interpretation of the Uniform Commercial Code (the Code).

One obstacle that must be overcome arises from the language of Section 2-313,⁴

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1. 168 Wash. 456, 12 P.2d 409 (1932). In this case, plaintiff sued the Ford Motor Company, *inter alia*, for injuries suffered when a pebble from a passing car struck the windshield of his car, causing small pieces of glass to fly into his eye. Plaintiff sought to introduce catalogues and printed matter furnished by Ford which stated that the Triplex shatter-proof glass windshield installed in all Ford cars was "so made that it will not fly or shatter under the hardest impact" and would "eliminate the dangers of flying glass" *Id.* at 459, 12 P.2d at 411.

2. *Id.* at 463, 12 P.2d at 412. After a second trial, judgment against the manufacturer was upheld. The court's opinion, however, seemed to focus more on the theory of misrepresentation than of warranty. *Baxter v. Ford Motor Co.*, 179 Wash. 123, 35 P.2d 1090 (1934).

3. *Baxter v. Ford Motor Co.*, 168 Wash. 456, 462-63, 12 P.2d 409, 412 (1932).

4. Section 2-313 of the Uniform Commercial Code provides:

(1) Express warranties by the seller are created as follows:

(a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.

(b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.

(c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

(2) It is not necessary to the creation of an express warranty that the seller use formal words such as 'warrant' or 'guarantee' or that he have a specific intention to make a warranty, but an affirmation merely of the value

which requires that there be "an affirmation of fact or promise" for an express warranty to be created. The Code specifically excludes claims that can be said to be merely statements as to the value of the goods, or which express only the seller's opinion or commendation.⁵ Advertising, by its very nature, is viewed by many with a high degree of skepticism. Arguably, many claims made in ads may be characterized merely as permissible "puffing." Furthermore, messages in advertising can be and often are communicated through more than the written or spoken word. Advertisers can create a "total sensory experience"—through music, graphics, movement, colors and images—that may convey promises about product performance and reasonably create consumer expectations without ever uttering, or articulating in writing, any specific promise or affirmation.⁶

Section 2-313 also requires that the affirmations or promises become "part of the basis of the bargain." The Official Comments to the Code and much of the case law insist that this language replaces the previous requirement of showing reliance on the statements made.⁷ Nevertheless, many cases dealing with warranty claims based on advertising take note of the plaintiff's reliance, or at least require that the ad have been seen at some time before the injury occurred.⁸

This Article will develop a theory of strict "claim" liability, based upon advertising representations, that will make express warranty protection available even to those consumers not in privity with the advertiser. Under this theory, recovery will be allowed for economic loss caused by a breach, as well as for losses resulting from personal injury. Representations creating express warranties will encompass those expressed in affirmative product claims, and those implied by the "net impression" of the ad. Finally, those consumers entitled to relief will include those who were not even aware of the advertisement at any time before the resultant injury occurred.

I. EXPRESS WARRANTIES AND THE REQUIREMENT OF PRIVACY

In 1842, the Court of the Exchequer, in *Winterbottom v. Wright*,⁹ created the general rule of nonliability of manufacturers and sellers to remote buyers for losses from defective products. The court sustained a demurrer to a suit by an injured coachman for breach of warranty against a third party who had contracted to maintain the coach. In dicta, Lord Abinger relied upon public policy grounds to support the requirement of privity: Unless we confine the operation of such contracts as this to the parties who entered into them, the most absurd and outrageous consequences, to

of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.

5. U.C.C. § 2-313(2)(1985).

6. For an interesting discussion of the problem this creates for courts that have to evaluate advertising claims made in the electronic media, see Kramer, *Marconian Problems, Gutenbergian Remedies: Evaluating the Multiple-Sensory Experience Ad on the Double-Spaced, Typewritten Page*, 30 FED. COMM. L.J. 35 (1977).

7. See U.C.C. § 2-313, comment 3; see also *infra* notes 99, 100, 114-117 and accompanying text.

8. See *infra* notes 101-105 and accompanying text.

9. 10 M & W 109, 152 Eng. Rep. 402, 11 L.J. Ex. 415 (1842).

which I can see no limit, would ensue.¹⁰ The concern expressed by this English court was carried by American jurists into cases seeking redress from remote manufacturers, and privity became firmly implanted in American common law as an essential element to an action on the contract.

Eventually, however, courts came to recognize that the notion of privity did not fit well in the contemporary commercial system of marketing and distributing merchandise. Courts began to reevaluate the role that traditional contract theory should play when allocating losses for injuries caused by defective products that were advertised in media directed to the public at large. For example, in *Rogers v. Toni Home Permanent Co.*,¹¹ the court took cognizance of the fact that historically an action grounded on breach of warranty actually arose from tort law. Consumers who relied on representations about goods which proved false were accorded redress by an action of trespass on the case to include deceit—an action which did not require that any contractual relationship be established.¹² Nevertheless, the court noted, the prevailing logic at the time was to apply traditional contractual concepts—like privity—to warranty claims.¹³ The court declined to do so in this matter, however, writing instead that:

Occasions may arise when it is fitting and wholesome to discard legal concepts of the past to meet new conditions and practices of our changing and progressing civilization. Today, many manufacturers of merchandise . . . make extensive use of newspapers, periodicals, signboards, radio, and television to advertise their products. The worth, quality, and benefits of these products are described in glowing terms and in considerable detail, and the appeal is almost universally directed to the ultimate consumer. . . . Surely under modern merchandising practices the manufacturer owes a very real obligation toward those who consume or use his products.¹⁴

The court went on to hold that where warranties are made in advertisements and on labels, manufacturers ought to be held strictly accountable to any consumer who buys the product in reliance on those representations and subsequently suffers physical injury because the product proved to be defective or harmful.¹⁵

Dean Prosser marks the "Fall of the Citadel"¹⁶ of privity as having occurred in 1960 in *Henningsen v. Bloomfield Motors*.¹⁷ In *Henningsen*, the plaintiff, the wife of a purchaser of an automobile,¹⁸ sought damages from the manufacturer of the

10. *Id.* at 114, 152 Eng. Rep. at 405, 11 L.J. Ex. at 415.

11. 167 Ohio St. 244, 147 N.E.2d 612 (1958). Plaintiff claimed she suffered physical injury after using the manufacturer's permanent wave product. She alleged that the defendant had represented in its advertising that the product was safe and harmless and that she purchased the product in reliance thereon.

12. *Id.* at 247, 147 N.E.2d at 614-15.

13. The court admitted that "[w]e are fully aware that the position outlined is opposed to the present weight of authority and may conflict with previous decisions of this court." *Id.* at 249, 147 N.E.2d at 616.

14. *Id.* at 248-49, 147 N.E.2d at 615.

15. *Id.* at 249, 147 N.E.2d at 615-16.

16. Prosser, *The Fall of the Citadel*, 50 MINN. L. REV. 791 (1966).

17. 32 N.J. 358, 161 A.2d 69 (1960).

18. Her husband also was a plaintiff in the action.

car,¹⁹ after she was injured while driving it. She alleged a mechanical defect and based her claim on both express and implied warranties.²⁰ The court wrestled with the privity issue, as well as those problems that arose from the existence of disclaimers and limitations of liability in the purchase agreement between the dealer and the plaintiff's husband. Referring to "modern marketing conditions," the court held that "when a manufacturer puts a new automobile into the stream of trade and promotes its purchase to the public, an implied warranty that it is reasonably suitable for use as such accompanies it into the hands of the ultimate purchaser."²¹ As to the disclaimers and limitations of liability that appeared in the contract, the court found that, under the circumstances, they were "so inimical to the public good as to compel an adjudication of [their] invalidity."²²

The *Henningsen* opinion exemplifies the obvious difficulties in applying warranty law to create manufacturer liability for injury caused by product defects. Often using public policy as a sword, the court was able to cut through the traditional contract and Sales Act doctrines of privity, reliance, freedom of contract,²³ and the requirement of prompt notice of a breach. However, these issues needed to be dealt with because the cause of action was couched in terms of "warranty."

In 1962, Justice Traynor put an end to the sham, writing for the California Supreme Court in *Greenman v. Yuba Power Products, Inc.*²⁴ In *Greenman*, a consumer sued the manufacturer of an allegedly defective power tool when he was injured while using it in accordance with the instructions contained in a brochure that came with the product. The action was based on a breach of warranty theory and negligence.²⁵ The manufacturer defended on the ground that the plaintiff failed to give timely notice of the breach pursuant to the California Sales Act.²⁶ Justice Traynor held that the failure to give such notice would not bar plaintiff's claim.²⁷ Furthermore, he stated that in order to impose liability on the manufacturer, the plaintiff did not need to establish that an express warranty, as defined by the California statute, was created.²⁸ Traynor wrote that warranty theory was inappropriate in cases like this one and ought not be used:

19. The dealer, Bloomfield Motors, was also named as a defendant.

20. There was also a claim of negligence on which the court did not express an opinion. *Id.* at 365, 161 A.2d at 73.

21. *Id.* at 384, 161 A.2d at 84. Later in the opinion, the court expanded this protection to anyone who, in the reasonable contemplation of the parties to the warranty, might be expected to become a user. *Id.* at 413, 161 A.2d at 99-100.

22. *Id.* at 404, 161 A.2d at 95.

23. The "agreement" between the parties, as evidenced by the purchase order signed by plaintiff husband, included a ninety-day, 4,000-mile express warranty against defective parts and workmanship, running only to the original purchaser. Pursuant to the "agreement," the manufacturer would replace any defective part, if the part was sent to the factory by the consumer, transportation charges prepaid, and if an examination at the factory disclosed, to the manufacturer's satisfaction, that the part was defective. The contractual provision in the "agreement" disclaimed any other warranties or obligations and limited the manufacturer's liability only to replacement of the defective part. 32 N. J. at 367, 161 A.2d at 74.

24. 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962).

25. *Id.* at 59, 377 P.2d at 898, 27 Cal. Rptr. at 698.

26. *Id.* at 60, 377 P.2d at 899, 27 Cal. Rptr. at 699.

27. *Id.* at 62, 377 P.2d at 900, 27 Cal. Rptr. at 700.

28. *Id.* at 62, 377 P.2d at 900, 27 Cal. Rptr. at 700.

[R]ules defining and governing warranties that were developed to meet the needs of commercial transactions cannot properly be invoked to govern the manufacturer's liability to those injured by their defective products unless those rules also serve the purposes for which such liability is imposed.²⁹

Instead, the court held, the manufacturer's liability should be recognized as one of strict liability in tort which automatically arises when the manufacturer places an article on the market that is defective and causes personal injury.³⁰

The Second Restatement of Torts codifies this concept in Section 402A. It makes anyone who sells a product in an unreasonably dangerous, defective condition strictly liable in tort to the consumer or user for personal injuries and property damage caused by the product.³¹ No privity is required and it is clear that traditional contract and warranty restrictions are not applicable.³² The cause of action is limited, however, by the requirement that the product have a defect,³³ that it be unreasonably dangerous,³⁴ and that it result in personal injury or property damage.³⁵

29. *Id.* at 63, 377 P.2d at 901, 27 Cal. Rptr. at 701.

30. *Id.* at 62, 377 P.2d at 900, 27 Cal. Rptr. at 700.

31. RESTATEMENT (SECOND) OF TORTS § 402A reads:

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

32. RESTATEMENT (SECOND) OF TORTS § 402A, comment m provides:

The rule stated in this Section does not require any reliance on the part of the consumer upon the reputation, skill, or judgment of the seller who is to be held liable, nor any representation or undertaking on the part of that seller. The seller is strictly liable although, as is frequently the case, the consumer does not even know who he is at the time of consumption. The rule stated in this Section is not governed by the provisions of the Uniform Sales Act, or those of the Uniform Commercial Code, as to warranties; and it is not affected by limitations on the scope and content of warranties, or by limitation to "buyer" and "seller" in those statutes. Nor is the consumer required to give notice to the seller of his injury within a reasonable time after it occurs, as is provided by the Uniform Act. The consumer's cause of action does not depend upon the validity of his contract with the person from whom he acquires the product, and it is not affected by any disclaimer or other agreement, whether it be between the seller and his immediate buyer, or attached to and accompanying the product into the consumer's hands. In short, "warranty" must be given a new and different meaning if it is used in connection with this Section. It is much simpler to regard the liability here stated as merely one of strict liability in tort.

33. See, e.g., *Livingston Serv. Co. v. Big Wheels, Inc.*, 96 Ill. App. 3d 591, 593, 421 N.E.2d 1042, 1043 (1981); *Larson v. Thomashow*, 17 Ill. App. 3d 208, 219, 307 N.E.2d 707, 717 (1974); *Johnson v. Peerless Supply Co.*, 437 So. 2d 966 (La. 1983); *Duncan v. Rockwell Mfg.*, 173 Mont. 382, 386, 567 P.2d 936, 939 (1977); *Barich v. Ottenstror*, 170 Mont. 38, 42, 550 P.2d 395, 398 (1976); *Scanlon v. General Motors Corp.*, 65 N.J. 582, 590, 326 A.2d 673, 682 (1974); *Parker v. Prince*, 656 S.W.2d 391, 394 (Tenn. Ct. App. 1983).

34. See, e.g., *Brech v. J.C. Penney Co.*, 698 F.2d 332, 333-34 (8th Cir. 1983)(applying South Dakota law); *Two Rivers Co. v. Curtis Breeding Serv.*, 624 F.2d 1242, 1245 (5th Cir. 1980)(applying Texas law); *Posttape Assocs. v. Eastman Kodak Co.*, 537 F.2d 751, 754 (3d Cir. 1976)(applying Pennsylvania law); *Morrow v. Trailmobile, Inc.*, 12 Ariz. App. 578, 581, 473 P.2d 780, 784 (1970); *Berkeley Pump Co. v. Reed-Joseph Land Co.*, 279 Ark. 384, 390, 653 S.W.2d 128, 131 (1983); *Moehle v. Chrysler Motors Corp.*, 93 Ill. 2d 299, 304, 443 N.E.2d 575, 577 (1982); *Brown v. Western Farmer's Ass'n*, 268 Or. 470, 477-78, 521 P.2d 537, 540-41 (1974).

35. See, e.g., *Posttape Assocs. v. Eastman Kodak Co.*, 537 F.2d 751 (3d Cir. 1976)(applying Pennsylvania law); *Fredonia Broadcasting Corp. v. RCA Corp.*, 481 F.2d 781 (5th Cir. 1973)(applying Texas law); *Bright v. Goodyear Tire & Rubber Co.*, 463 F.2d 240 (9th Cir. 1972)(applying California law); *Southwest Forest Indus., Inc. v. Westinghouse Elec. Corp.*, 422 F.2d 1013 (9th Cir. 1970), *cert. denied*, 400 U.S. 902 (1970)(applying Arizona law); *Plainwell Paper Co. v. Pram, Inc.*, 430 F. Supp. 1386 (W.D. Pa. 1977)(applying Pennsylvania law); *Midland Forge, Inc. v. Letts Indus., Inc.*, 395 F. Supp. 506 (N.D. Iowa 1975)(applying Iowa law); *Arizona v. Cook Paint & Varnish Co.*, 391 F. Supp. 962

The privity problem is also avoided by relying on a tort theory encompassed in Section 402B of the Second Restatement of Torts. This section has its roots in the law of deceit, and creates strict tort liability for a manufacturer who makes a misrepresentation concerning a material fact about his product which causes physical harm to a consumer who justifiably relied upon it.³⁶ Even though there no longer must be a showing that the product was defective or unreasonably dangerous, the consumer must prove the existence of a misrepresentation and his justifiable reliance upon it in purchasing or using the product,³⁷ and recovery is still limited to those who suffer physical injury.³⁸

In *Randy Knitwear, Inc. v. American Cyanamid Company*,³⁹ the New York Court of Appeals addressed the issue of whether an economic loss could be recovered, regardless of the lack of privity. A garment manufacturer brought an action against a resin manufacturer with whom he had no contractual relationship. The action was based on an express warranty that the plaintiff alleged arose from advertising and labels touting the nonshrinkable character of products treated with the defendant's process.⁴⁰ The court upheld the plaintiff's cause of action, explaining that the rejection of the privity requirement was easily understandable given the present-day marketing process and the expanded role that advertising plays in that process. According to the court,

(D. Ariz. 1975) (concluding that under the law either Arizona, California, Hawaii, Texas, or Alaska purely economic losses were not recoverable in strict tort liability), *aff'd*, 541 F.2d 226 (9th Cir. 1976); *Cooley v. Salopian Indus., Ltd.*, 383 F. Supp. 1114 (D.S.C. 1974)(applying South Carolina law); *Morrow v. New Moon Homes, Inc.*, 548 P.2d 279 (Alaska 1976); *Beauchamp v. Wilson*, 21 Ariz. App. 14, 515 P.2d 41 (1973); *Anthony v. Kelsey-Hayes Co.*, 25 Cal. App. 3d 442, 102 Cal. Rptr. 113 (1972); *Seely v. White Motor Co.*, 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965); *Hilgel v. General Motors Corp.*, 544 P.2d 983 (Colo. 1975); *Cedars of Lebanon Hosp. Corp. v. European X-ray Distrib. of America, Inc.*, 444 So.2d 1068, 1071 (Fla. Dist. Ct. App. 1984); *State v. Mitchell Constr. Co.*, 108 Idaho 335, 336, 699 P.2d 1349, 1350 (1984); *Moorman Mfg. Co. v. Nat'l Tank Co.*, 91 Ill. 2d 69, 435 N.E.2d 443 (1982); *Hawkins Construction Co. v. Matthews Co.*, 190 Neb. 546, 209 N.W.2d 643 (1973); *Hiles Co. v. Johnston Pump Co.*, 560 P.2d 154 (Nev. 1977); *Avenell v. Westinghouse Elec. Corp.*, 41 Ohio App. 2d 150, 324 N.E.2d 583 (1974); *Price v. Gatlin*, 241 Or. 315, 405 P.2d 502 (1965); *Nobility Homes, Inc. v. Shivers*, 557 S.W.2d 77 (Tex. 1977).

There are a very limited number of jurisdictions that have allowed recovery of purely economic loss on a strict tort liability theory. The principle case is *Santor v. A. & M. Karagheusian, Inc.*, 44 N.J. 52, 66, 207 A.2d 305, 312 (1965). See also *Mead Corp. v. Allendale Mut. Ins. Co.*, 465 F. Supp. 355, 366 (N.D. Ohio 1979)(applying Ohio law); *Cova v. Harley Davidson Motor Co.*, 26 Mich. App. 602, 609, 182 N.W.2d 800, 804 (Mich. Ct. App. 1970); *City of LaCrosse v. Schubert, Schroeder & Assoc., Inc.*, 72 Wis. 2d 38, 44, 240 N.W.2d 124, 127 (1976).

36. RESTATEMENT (SECOND) OF TORTS § 402B states:

One engaged in the business of selling chattels who, by advertising, labels, or otherwise, makes to the public a misrepresentation of a material fact concerning the character or quality of a chattel sold by him is subject to liability for physical harm to a consumer of the chattel caused by justifiable reliance upon the misrepresentation, even though

(a) it is not made fraudulently or negligently, and

(b) the consumer has not bought the chattel from or entered into any contractual relation with the seller.

37. RESTATEMENT (SECOND) OF TORTS § 402B, comment j states in part that:

The rule here stated applies only where there is justifiable reliance upon the misrepresentation of the seller, and physical harm results because of such reliance, and because of the fact misrepresented. It does not apply where the misrepresentation is not known, or there is indifference to it, and it does not influence the purchase or subsequent conduct . . .

38. See, e.g., *Jones & Laughlin Steel v. Johns-Manville Sales*, 626 F.2d 280, 288 (3d Cir. 1980) (applying Illinois law); *Walker & Truck Contractors, Inc. v. Crane Carrier Co.*, 405 F. Supp. 911, 912 (E.D. Tenn. 1975); *National Crane Corp. v. Ohio Steel Tube Co.*, 213 Neb. 782, 788, 332 N.W.2d 39, 43 (1983).

39. 11 N.Y.2d 5, 181 N.E.2d 399, 226 N.Y.S.2d 363 (1962).

40. *Id.* at 9-10, 181 N.E.2d at 400, 226 N.Y.S.2d at 365.

[t]he world of merchandising is, in brief, no longer a world of direct contact; it is, rather, a world of advertising and, when representations expressed and disseminated in the mass communications media and on labels . . . prove false and the user or consumer is damaged by reason of his reliance on those representations, it is difficult to justify the manufacturer's denial of liability on the sole ground of the absence of technical privity. . . . The manufacturer places his product upon the market and, by advertising and labeling it, represents its quality to the public in such a way as to induce reliance upon his representations. He unquestionably intends and expects that the product will be purchased and used in reliance upon his express assurance of its quality and, in fact, it is so purchased and used. Having invited and solicited the use, the manufacturer should not be permitted to avoid responsibility, when the expected use leads to injury and loss, by claiming that he made no contract directly with the user.⁴¹

These thoughts were echoed by an Ohio court faced with deciding whether to expand its earlier holding in *Rogers v. Toni Home Permanent*⁴² to include loss in the diminution in value of the product caused by its failure to live up to representations made in advertising. The court decided that "justice requires that the consumer who has been caused to suffer substantial pecuniary losses by national advertising of false claims should be protected regardless of the lack of privity."⁴³ Numerous other jurisdictions have followed the same reasoning in allowing consumers to recover economic loss on an express warranty theory, especially when those express warranties were created by representations in advertising that induced the purchase of the product.⁴⁴

41. *Id.* at 12-13, 181 N.E.2d at 402-03, 226 N.Y.S.2d at 367-68.

42. 167 Ohio St. 244, 147 N.E.2d 612 (1958).

43. *Inglis v. American Motors Corp.*, 3 Ohio St. 2d 132, 141, 209 N.E.2d 583, 588-89 (1965).

44. *See, e.g.*, California: *Smith v. Gates Rubber Co.*, 237 Cal. App. 2d 766, 47 Cal. Rptr. 307 (1965); *Thomas v. Olin Mathieson Chem. Corp.*, 255 Cal. App. 2d 806, 63 Cal. Rptr. 454 (1967); Delaware: *Autrey v. Chemitrust Indus. Corp.*, 362 F. Supp. 1085 (D.C. Del. 1973)(no distinction made between express and implied warranties); Iowa: *Midland Forge, Inc. v. Letts Indus. Inc.*, 395 F. Supp. 506 (N.D. Iowa 1975); Montana: *Whitaker v. Farmhand Inc.*, 173 Mont. 345, 567 P.2d 916 (1977); Nebraska: *Hawkins Constr. Co. v. Matthews Co., Inc.*, 190 Neb. 546, 209 N.W.2d 643 (1973); New Jersey: *Spring Motors Distrib., Inc. v. Ford Motor Co.*, 98 N.J. 555, 489 A.2d 660 (1985); North Carolina: *Kinlaw v. Long Mfg. N.C., Inc.*, 298 N.C. 494, 259 S.E.2d 552 (1979)(owner's manual); North Dakota: *Lang v. General Motors Corp.*, 136 N.W.2d 805 (N.D. 1965) (because of mass advertising campaigns, privity should not be a defense—but recovery is based on implied warranty of merchantability rather than express warranty); South Carolina: *Campus Sweater & Sportswear Co. v. M.B. Kahn Constr. Co.*, 515 F. Supp. 64 (D.C. S.C. 1979), *aff'd without op.*, 644 F.2d 877 (4th Cir. 1981); Tennessee: *Ford Motor Co. v. Lonon*, 217 Tenn. 400, 398 S.W.2d 240 (1966); Texas: *Industri-Chem Laboratory v. Par-Park Co.*, 602 S.W.2d 282 (Tex. Civ. App. 1980)(express warranty by sample); *Ford Motor Co. v. Lemieux*, 418 S.W.2d 909 (Tex. Civ. App. 1967); Washington: *Daughtry v. Jet Aeration Co.*, 91 Wash. 2d 704, 592 P.2d 631 (1979).

The cases are less consistent on whether economic losses may be recovered for a breach of the implied warranty of merchantability. Cases retaining the privity requirement in implied warranty actions for economic loss include: *Koellmer v. Chrysler Motors Corp.*, 6 Conn. Cir. Ct. 478, 276 A.2d 807 (1970); *General Motors Corp. v. Halco Instruments, Inc.*, 124 Ga. App. 630, 185 S.E.2d 619 (1971); *Spiegel v. Sharp Elec. Corp.*, 125 Ill. App. 3d 897, 466 N.E.2d 1040 (1984); *Necktas v. General Motors Corp.*, 357 Mass. 546, 259 N.E.2d 234 (1970); *Oliver v. City Builders*, 303 So. 2d 466 (Miss. 1974); *Hupp Corp. v. Metered Washer Serv.*, 256 Or. 245, 472 P.2d 816 (1970); *Henry v. John W. Eshelman & Sons*, 99 R.I. 518, 209 A.2d 46 (1965); *City of LaCrosse v. Shubert, Schroeder & Assocs., Inc.*, 72 Wis. 2d 38, 240 N.W.2d 124 (1976). The leading case taking the opposite view no longer requiring privity as a prerequisite to recovery of economic loss in implied warranty actions is *Morrow v. New Moon Homes, Inc.*, 548 P.2d 279 (Ala. 1976). Other cases include *Lynne Carol Fashions, Inc. v. Cranston Print Works Co.*, 453 F.2d 1177 (3d Cir. 1972) (applying Pennsylvania law); *Manheim v. Ford Motor Co.*, 201 So. 2d 440 (Fla. 1967); *Hiles Co. v. Johnston Pump Co.*, 93 Nev. 73, 560 P.2d 154 (1977); *Gasque v. Eagle Mach. Co.*, 270 S.C. 499, 243 S.E.2d 831 (1978); *Nobility Homes of Texas, Inc. v. Shivers*, 557 S.W.2d 77 (Tex. 1977); *Western Equip. Co. v. Sheridan Iron Works, Inc.*, 605 P.2d 806 (Wyo. 1980).

The Uniform Commercial Code takes no position on the question of privity between the manufacturer of the product and the ultimate purchaser.⁴⁵ Comment 3 to Section 2-318 of the Code states that beyond the coverage provided therein, the section is "neutral and is not intended to enlarge or restrict the developing case law on whether the seller's warranties, given to his buyer who resells, extend to other persons in the distributive chain."⁴⁶ Some courts have taken this language as an invitation to, in fact, discard the notion of "vertical" privity.⁴⁷ Comment 2 to Section 2-313 seems to provide further support for that position by stating that "the warranty sections of this Article are not designed in any way to disturb those lines of case law growth which have recognized that warranties need not be confined *either to sales contracts or to the direct parties to such a contract . . .*"⁴⁸

Privity, then, usually will not be a bar when dealing with express warranties, especially those that arise from advertising. Moreover, lack of privity will not normally bar recovery even where only economic loss is involved.⁴⁹ The rationale most often employed in the cases is that the advertiser has, by its actions, created the market for the products by making claims about their quality and performance that induce consumers to purchase them. When some kind of loss occurs, including the failure to live up to the performance level established by the advertiser's claims, the advertiser ought to compensate for that loss, despite the fact that no direct contractual relationship between the advertiser and the ultimate consumer exists.

The problem, however, comes in setting the parameters of when Uniform Commercial Code requirements are met with respect to advertising so as to create express warranty liability under the Code. The questions that need to be addressed concern the nature of the advertising representations that can actually create express warranties, and the conduct required of the consumer to establish the ability to recover when those warranties are breached.

45. In Section 2-318, however, the Code establishes warranty liability for injury to third party beneficiaries. This is known as "horizontal" privity. The injured party is not a buyer in the distributive chain but one who is affected by the goods. The Code provides three alternatives for adoption by the various states. Alternative A limits its coverage to family members and persons within the household who would be reasonably expected to use, consume, or be affected by the goods and who are injured in person. Alternative B expands the coverage to any natural person who would be reasonably expected to use, consume, or be affected by the goods and who suffers personal injury. Alternative C deletes the word "natural" before the word "person" and does not limit the injury to "injury in person."

46. U.C.C. § 2-318, comment 3.

47. The Pennsylvania Supreme Court, in *Kassab v. Central Soya*, 432 Pa. 217, 232-34, 246 A.2d 848, 855-56 (1968), discussed the Code's position on vertical privity and whether the court itself could abolish the requirement:

The answer to this question is provided in the clearest of language by the drafters of the [C]ode in comment 3 to Section 2-318. . . . [I]t is clear beyond peradventure that [they] never intended 2-318 to set any limits on vertical privity, nor did they intend all changes in the law to come only from the Legislature. . . . There thus is nothing to prevent this [c]ourt from joining in the growing number of jurisdictions which, although bound by the [C]ode, have nevertheless judicially abolished vertical privity in breach of warranty cases.

48. U.C.C. § 2-313, comment 2.

49. Lack of privity is most certainly not a problem in express warranty cases based upon advertising where personal injury is involved. See *Scheuler v. Aamco Transmissions*, 1 Kan. App. 2d 525, 528, 571 P.2d 48, 51 (1977) where the court notes that "an increasing number of cases are holding or recognizing that under such circumstances a consumer can recover for breach of express warranty despite a lack of privity." (citing 2 FRUMER AND FRIEDMAN, *PRODUCTS LIABILITY* § 16.04 [4][a] (1960)).

II. CREATING AN EXPRESS WARRANTY

A. An Affirmation of Fact or a Promise

1. The Issue of "Puffing"

Section 2-313 of the Uniform Commercial Code provides that express warranties are created by "any affirmation of fact or promise made by the seller to the buyer which relates to the goods . . ."⁵⁰ No formal words need be used nor must a specific intention to make a warranty be shown, but an affirmation of value of the goods or of merely the seller's opinion would not be sufficient to create a warranty.⁵¹

The Code recognizes that not every statement made by the seller will constitute an express warranty; sellers will always be expected to engage in sales talk or "puffing."⁵² Distinguishing between which representations made by the seller establish warranty liability, and which are merely permissible "puffery" is a task that is not easily accomplished.⁵³ The fact-opinion dichotomy can be explored by: (1) reference to the specificity⁵⁴ and verifiability⁵⁵ of the claim; (2) the bargaining positions and relative knowledge of the parties to the transaction;⁵⁶ (3) the circumstances of the sale;⁵⁷ (4) the language used by the seller and the extent to which

50. U.C.C. § 2-313(1)(a). Express warranties may also be created by descriptions (§ 2-313(1)(b)) or samples or models (§ 2-313(1)(c)).

51. U.C.C. § 2-313(2).

52. Courts and commentators, however, have remarked that the trend has been "toward narrowing the scope of 'puffing' and expanding the liability that flows from broad statements of manufacturers as to the quality of their products." *Hauter v. Zogarts*, 14 Cal. 3d 104, 112, 534 P.2d 377, 381, 120 Cal. Rptr. 681, 685 (1975). See also R. NORDSTRUM, HANDBOOK OF THE LAW OF SALES at 217 (1970).

53. White and Summers write that "anyone who says he can consistently tell a 'puff' from a warranty may be a fool or a liar." J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE 329 (2d ed. 1980).

54. See, e.g., *Hawkins Constr. Co. v. Matthews Co., Inc.*, 190 Neb. 546, 564-65, 209 N.W.2d 643, 654 (1973) (A statement in advertising that a piece of equipment was "designed to safely carry working loads up to 20,000 pounds per panel," constituted an express warranty as a matter of law because it concerned *specific* performance capabilities.); *Art Hill, Inc. v. Heckler*, 457 N.E.2d 242, 245 (Ind. Ct. App. 1983) (Repeated assurances that a fifth-wheel camper would be compatible with a five-eighth ton pickup truck were held to be "specific positive statements" creating an express warranty.)

55. See, e.g., *Young & Cooper, Inc. v. Vestring*, 214 Kan. 311, 322, 521 P.2d 281, 290 (1974) where the court wrote:

[R]epresentations of fact *capable of determination* are warranties, but mere expressions of opinion, belief, judgment, or estimate by a dealer in sales talk are not. Where opinions are coupled with representations of fact which relate to such matters and are *susceptible of exact knowledge*, they constitute more than a mere opinion and are properly regarded as representations of fact, and, to the extent that they are representations of fact, they constitute warranties. (emphasis supplied).

See also *Kates Millinery, Ltd. v. Benay-Albee Corp.*, 114 Misc. 2d 230, 231, 450 N.Y.S.2d 975, 977 (N.Y. Civ. Ct. 1982) (A seller's statement that a machine was "one-year old" constituted an express warranty since it was a statement of *provable fact*.)

56. See, e.g., *Royal Business Mach., Inc. v. Lorraine Corp.*, 633 F.2d 34, 41 (7th Cir. 1980) ("The decisive test for whether a given representation is a warranty or merely an expression of the seller's opinion is whether the seller asserts a fact of which the buyer is ignorant or merely states an opinion or judgment on a matter of which the seller has no special knowledge and on which the buyer may be expected also to have an opinion and to exercise his judgment.") See also *Sessa v. Riegler*, 427 F. Supp. 760 (E.D. Pa. 1977) (involving two experienced horse dealers).

57. See *Acme Equip. Corp. v. Montgomery Coop. Creamery Ass'n.*, 29 Wis. 2d 355, 360-61, 138 N.W.2d 729, 731-32 (1966), a pre-Code case where the phrase "in good shape and good working order" was found to be an affirmation of fact as a matter of law. In that case, plaintiffs refused to tender payment for the goods unless the seller wrote those words on the bill of sale. Similarly, in *Pronti v. DML of Elmira, Inc.*, 103 A.D.2d 916, 917, 478 N.Y.S.2d 156,

he equivocates in the statements he makes;⁵⁸ and (5) the nature of the defect and the seriousness of the injury.⁵⁹

Perhaps the single most important factor in the cases attempting to distinguish between affirmations of fact and permissible "puffery" is the degree of reliance the buyer reasonably places upon the seller's representations. Although the Code states that a showing of reliance is no longer required to establish an express warranty,⁶⁰ many courts use the fact-opinion dichotomy as a way of reintroducing the issue of justifiable reliance into the case.⁶¹

Where advertising is involved, especially in national media like television or magazines, the argument can thus be made that there is such a high degree of skepticism among consumers that no reasonable person accepts the representations made as accurate product information on which they may rely. People think of television advertising in the same manner as they did the traveling "snake oil" salesman or the prototype used car salesman—not to be trusted or believed.⁶² Using an analysis that focuses on reliance might lead one to conclude that claims made in certain advertising media with low degrees of credibility are more likely to be perceived as "sales talk" or "puffery" than as affirmations of fact constituting express warranties.

However, whether a representation creates an express warranty or is merely "puffing" is a question of fact for the jury,⁶³ and as such, needs to be determined on a case-by-case basis. The court should address the representation made in the context of the seller's message itself rather than in the context of the general credibility of the media it utilizes. According to the Code comments, the basic question concerning

157 (1984), when the buyer added the words "delivered in perfect condition or withdraw from agreement to buy without penalty," an express warranty as to the condition of the merchandise was created.

58. See *Hupp Corp. v. Metered Washer Serv.*, 256 Or. 245, 472 P.2d 816 (1970)(no express warranty when the seller qualified his claims with the words "maybe," "we think," and [this] "might" [solve your problems]); *Hobson Constr. Co. v. Hajoca Corp.*, 28 N.C. App. 2d 684, 689, 222 S.E.2d 709, 712 (1976)(Use of the word "should" in describing what the product was intended to do kept the statement from becoming an affirmation of fact.)

59. That is, a court may be more inclined to find that an express warranty is created by the use of an otherwise opinion-laden term like "good condition" when the product is grossly defective or, when as a matter of policy, the court wants to allocate the loss to the defendant. See, e.g., *Eddington v. Dick*, 87 Misc. 2d 793, 386 N.Y.S.2d 180 (1976) (item required more than 100% of the purchase price to put it in working order); *Jones v. Kellner*, 5 Ohio App. 3d 242, 451 N.E.2d 548 (1982)(Car was represented as in "A-1" condition mechanically and on the way home from the sale it stalled, needed to be towed and had estimated repairs which would exceed the purchase price.)

With respect to these situations, Williston writes:

The distinction between an affirmation or a description . . . from mere sales talk, or opinion, or puffing is so hazy that the courts in the final analysis will often rely on their own sense of fair play, thereby evaluating the intentions of the parties to create an express warranty in making their findings for the plaintiff or the defendant.

WILLISTON ON SALES, (4th ed. 1974), § 17-5 at 10.

60. U.C.C. § 2-313, comment 3.

61. *R. WHITE & J. SUMMERS*, *supra* note 53, at 330. See also *Carter Hawley Hale Stores v. Conley*, 372 So. 2d 965, 969 (Fla. Dist. Ct. App. 1979)(under the Code, the category of statements that are "merely the seller's opinion or commendation" includes "statements upon which the buyer has no right to rely . . .").

62. According to the Newspaper Advertising Bureau, only 39% of viewers regard TV ads as "believable." Heilbroner, "Advertising as Agitprop," *Harper's*, 72-73, January 1985.

63. *Peterson v. North Am. Plant Breeders*, 218 Neb. 258, 262, 354 N.W.2d 625, 630 (Neb. 1984); *Pake v. Byrd*, 55 N.C. App. 551, 286 S.E.2d 588 (N.C. Ct. App. 1982); *Scientific Application, Inc. v. Delkamp*, 303 N.W.2d 71, 74 (N.D. 1981); *Scheirman v. Coulter*, 624 P.2d 70, 72 (Okla. 1980); *Autzen v. John C. Taylor Lumber Sales*, 280 Or. 783, 790, 572 P.2d 1322, 1326 (1977); *Indust-Ri-Chem Laboratory v. Par-Pak Co.*, 602 S.W.2d 282, 290 (Tex. Civ. App. 1980).

affirmations of value or a seller's opinion or commendation under subsection (2) is: "What statements of the seller have in the circumstances and in objective judgment become part of the basis of the bargain?"⁶⁴ When this Article addresses that issue, it will deal in detail with the question of the role that consumer reliance and the effectiveness of advertising as an inducement to a particular sale should play in determining whether warranty liability arises. Suffice it to say that it seems incongruous for advertisers, who spend millions of dollars a year to persuade consumers to buy their products, to argue that what they said should not have been believed.

2. Express Warranties Arising From Other Than Words

a. Warranties by Description

As discussed in the previous section, courts will look at the words used in the context of a sales transaction to determine if the seller made "promises" or "affirmations" that created an express warranty. Advertising, however, presents some very special problems because the message conveyed to the ultimate purchaser is often communicated by more than just the spoken or written word. As one commentator writes, "The media have left the written word behind in a cloud of dust and have created a new environment of multiple-sensory experience of which the written word is a minor part."⁶⁵

To some extent, the Uniform Commercial Code addresses this issue by providing that express warranties can be created by descriptions of the goods.⁶⁶ Courts have held that pictures appearing in advertising brochures or catalogues may constitute representations about the product that give rise to express warranties.

In *Rinkmasters v. City of Utica*,⁶⁷ the defendant ordered a resurfacing tank and five scrapers for its ice skating rink after reviewing the plaintiff's "Purchasing Guide," in which items for sale were described and illustrated. The description in the guide gave the dimensions of the tank and stated that special sizes were made to order. The scrapers were described as "top quality aluminum" and were to be ordered according to size. There were no other descriptive words regarding either of the items but in both cases there was an accompanying illustration. The defendant ordered the goods using the exact terms as set forth in the "Purchasing Guide." When the defendant received the goods, they conformed to the written description but varied in a significant manner from the illustrations.⁶⁸ The defendant attempted to

64. U.C.C. § 2-313, comment 8.

65. Kramer, *supra* note 6, at 35.

66. U.C.C. § 2-313(1)(b) provides, in pertinent part, that:

(1) Express warranties by the seller are created as follows:

(b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.

67. 75 Misc. 2d 941, 348 N.Y.S.2d 940 (1973).

68. The illustration of the resurfacing tank showed it with a water-release handle near the pushing bar and a blade in front of the tank which extended considerably beyond the tank's width. The tank as delivered had the water-release bar located beyond the reach of the operator, which would necessitate stopping the tank each time the operator wanted to

return the items, claiming that they were not in accordance with what had been ordered, but the plaintiff refused delivery and sued for the purchase price.

The court noted that the Uniform Commercial Code creates an express warranty that the goods shall conform to the description.⁶⁹ In addressing the question of what constitutes a description of the goods, the court wrote:

Most of the cases have involved the . . . description of merchandise [in words]. However, there has been an increased use of illustrated catalogues and brochures by businesses in search of trade. The traveling salesman has been replaced by the catalogue. Multi-colored catalogues are thrust upon the public as invitations to purchase. Description by words is limited, but drawings, photographs, and blueprints are profusely used to guide and entice the purchaser. It is axiomatic that a 'picture is worth a thousand words.' The description of goods set forth in the Uniform Commercial Code certainly covers illustrations as well as words.⁷⁰

Other cases have held that pictorial representations of the product in use can supplement a written or verbal description of its capabilities. In *Ford Motor Co. v. Lemieux Lumber Co.*,⁷¹ a brochure showing pictures of a truck crossing streams and ditches and climbing mountains was used to help show that a warranty was created for the buyer. The buyer needed a vehicle which could perform under demanding conditions, and the seller had been aware of the buyer's specific needs.⁷²

In *Sylvestri v. Warner & Swasey Co.*,⁷³ the plaintiff was injured while using a backhoe for lifting boulders. The defendant maintained that the jury had insufficient evidence to support a finding that the backhoe had been expressly warranted to be used to lift and move boulders in the manner in which the plaintiff was using it at the time of the accident.⁷⁴ The company's advertising brochure, however, contained a picture of the backhoe being used to lift a length of pipe, and stated that the "hydraulic system provides powerful lift force for material handling, sewerpipe laying, etc."⁷⁵ The court held that whether the brochure picture and statements as a whole represented an affirmation of fact or promise that the machine could be used as plaintiff had used it was a question properly left to the jury.⁷⁶ The court so held even though the plaintiff apparently did not attach the rock to the backhoe in exactly the same manner that the pipe was attached in the brochure picture, and even though lifting rock was in some ways different from lifting pipe. The court wrote, "It is the 'essential idea' conveyed by the advertising representations which is relevant . . . and the representations made here by [defendant] support a jury finding favorable to [plaintiff]."⁷⁷

release water onto the ice. Additionally, the blade did not extend beyond the width of the tank, as illustrated, but was in fact similar to tanks the plaintiff already had in use at its rink.

The scrapers, as pictured in the guide, were concave and attached to a handle supported by two angle irons. The scrapers delivered were flat and had no supporting irons.

69. 75 Misc. 2d at 943, 348 N.Y.S.2d at 942 (referring to U.C.C. § 2-313(1)(b)).

70. *Id.* at 943-44, 348 N.Y.S.2d at 942-43.

71. 418 S.W.2d 909 (Tex. Civ. App. 1967).

72. *Id.* at 911.

73. 398 F.2d 598 (2d Cir. 1968).

74. *Id.* at 602.

75. *Id.*

76. *Id.*

77. *Id.*

The television media creates problems unique from those arising from photographs contained in brochures. Television advertising is so very effective because it can give "life" to impersonal claims by providing the consumer with the opportunity to "see it for themselves." When that occurs, however, a claim that may otherwise be qualified takes on new significance. In *Drayton v. Jiffee Chemical Corp.*,⁷⁸ for example, the defendant represented that its product, a liquid drain cleaner, was "safe" and "fast acting." The plaintiff sued on an express warranty theory⁷⁹ to recover for severe facial disfigurement suffered by an infant as the result of a chemical burn from the product which had spilled. When the defendant tried to argue that the "safe" representation was only meant to convey that the product would not damage drains,⁸⁰ the plaintiff introduced as evidence a television commercial that had shown a human hand swishing water around in a kitchen sink.⁸¹ On the basis of that commercial, the court was easily able to uphold as reasonable the trial judge's finding that the safety representation pertained to human contact.⁸²

In a somewhat similar unreported case,⁸³ a plaintiff sued defendant Ford Motor Company when Ford, through its representative, refused to repair damage to a pickup truck that was sustained after the plaintiff had driven the truck over rough terrain. Ford claimed that the damage was not covered by its written warranty because it was the result of "misuse" by the plaintiff. The plaintiff argued that, even if he had exceeded the bounds of the written warranty that came with the vehicle, certain television and magazine advertising and a cassette film stating the vehicle was "Built Tough" and showing the truck being driven on- and off-the-road, created an additional express warranty that the truck he purchased could withstand such use. The plaintiff won and was awarded damages and costs.⁸⁴

b. Determining What Representations Are Made

Determining precisely what representations are made in an advertisement has long been the province of the Federal Trade Commission.⁸⁵ Although the purpose of the FTC's inquiry—the prevention of deception⁸⁶—is somewhat different from that

78. 591 F.2d 352 (6th Cir. 1978).

79. The plaintiff also sought to recover on theories of negligence, strict tort liability, and implied warranty of merchantability. In a nonjury trial, the district court found for the plaintiffs on all counts. The circuit court upheld the finding of liability on the narrow ground of breach of express warranty. The court stated:

Because of the very limited evidence on the state of the art at the time of its manufacture, because of the widespread use of this and like products throughout the United States at this time, and because the injury resulting came not from the product's proper use but from its misuse, we refrain from ruling upon the trial judge's conclusions of liability on the basis of a breach of implied warranty, strict liability and negligent design.

Id. at 358.

80. *Id.*

81. This advertisement was terminated by the company's advertising agency "to avoid any possible misinterpretation" of the word "safe," but as the court noted, "only after the Code Authority of the National Association of Broadcasters intervened and questioned the advertising copy in this regard." *Id.*

82. *Id.* at 359.

83. *Lastovich v. Ford Motor Co.*, File No. 493-SC (Hibbing Cty. Ct., Minn., Feb. 10, 1978).

84. The jury verdict was upheld without an opinion by the court.

85. "The meaning of advertisements or other representations to the public . . . are questions of fact to be determined by the Commission . . ." *Kalwajtys v. FTC*, 237 F.2d 654, 656 (7th Cir. 1956); *J.B. Williams Co. v. FTC*, 381 F.2d 884, 889 (6th Cir. 1967).

86. 15 U.S.C. § 45(a)(2) (1986) provides, in pertinent part: "The Commission is hereby empowered and directed

of assessing liability on the basis of express warranties that may be created, certain aspects of the doctrine that has developed may be informative here.⁸⁷

The Commission itself once wrote that "[i]nterpreting advertising claims is not a mystical process; it involves the exercise of common sense and good judgment."⁸⁸ When the FTC considers what representations are being made in advertising, it goes beyond the literal meaning of the words, and looks instead at the "net impression" or "overall impact" that the ad makes on consumers.⁸⁹ Respondents may be liable not only for the representations that they make directly, but also for implied representations that can reasonably be drawn by members of the audience to whom the message is directed.⁹⁰ In cases of implied claims, the Commission will often be able to determine meaning through an examination of the representation itself, including an evaluation of such factors as the entire document, the juxtaposition of various phrases in the document, the nature of the claim, and the nature of the transaction.⁹¹ Although the cases have allowed the Commission to rely upon its accumulated expertise,⁹² extrinsic evidence may also be used to determine what representations have been made in advertising. This evidence may include statistically sound consumer perception surveys and copy tests prepared by the advertiser prior to an ad's dissemination.

The Commission also expressly recognizes the particular problems presented in determining what representations are made in the electronic media.⁹³ One administrative law judge relied heavily on Marshall McLuhan's perspectives and insights in discussing how to interpret messages in television commercials. He wrote:

Today's printed and electronic mass communication does not aim to communicate classified data and fragments of information in the conventional sense as much as it stresses pattern recognition, in which visual and aural configurations serve as symbols. The 'message' is not to be understood through the technical meaning of printed or spoken words

to prevent persons, partnerships, or corporations . . . from using . . . unfair or deceptive acts or practices in or affecting commerce."

87. An FTC deceptive advertising case begins first with determining what claims are being made in a given advertisement. Once that has been established, then the inquiry is whether those claims, so identified, are false or misleading. *See, e.g., In re Cliffdale Associates*, 103 F.T.C. 110, 166, 167 (1984). Because the purpose of the statutory scheme is largely preventative to protect the general public, rather than determinative of whether individual losses ought to be compensated as in warranty liability cases, the interpretation standard arguably may be less rigorous. *See F.T.C. v. Sterling Drugs, Inc.*, 317 F.2d 669, 674 (1963).

88. *In re Bristol-Myers*, 102 F.T.C. 21, 319 (1983).

89. *J.B. Williams Co. v. FTC*, 381 F.2d 884, 889 (6th Cir. 1967); *Carter Prods., Inc. v. FTC*, 323 F.2d 523, 528; *In re Bristol-Myers*, 102 F.T.C. 21, 320 (1983); *In re American Home Prods.*, 98 F.T.C. 136, 374 (1981).

90. Note that the "implied representations" spoken of here are not to be confused with "implied warranties" that arise under the Code. "Implied representations" are representations not directly or expressly made by the advertiser but claims that can reasonably be drawn from the "net impression" of the ad. "Implied warranties," on the other hand, are created by operation of law (U.C.C. § § 2-314, 2-315) and become part of any contract unless disclaimed (U.C.C. § 2-316).

91. Commission Letter on Deception to Honorable John D. Dingell, Chairman, Subcommittee on Oversight and Investigations, Committee on Energy and Commerce 4 (October 14, 1983).

92. *See FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 391-92 (1965); *see also J.B. Williams Co. v. FTC*, 381 F.2d 884, 889 (6th Cir. 1967) ("[T]he Commission may draw its own inferences from the advertisement and need not depend on testimony or exhibits (aside from the advertisements themselves) introduced into the record.")

93. Even the Supreme Court, in addressing the commercial speech issue in *Bates v. State Bar of Arizona*, 433 U.S. 350, 384 (1977), recognized that "the special problems of advertising on the electronic broadcast media will warrant special consideration."

or sounds as much as it is through recognition of the aural-visual pattern of the 'medium' itself. At the risk of oversimplification, the message is recognized and understood through patterns of aural-visual symbols which are intended to evoke a desired imagery. A casual viewer of today's television commercials is struck by the element of essential truth in McLuhan's epigram. In my view, it is fair to say that, with respect to many television commercials that one encounters today, their evaluation is not complete when one stops at the meaning of their technical 'content'—what the spoken words say. One needs to proceed to the 'pattern' of symbols—what the commercial (medium) in its totality symbolizes to the psychic and social consciousness of the audience-viewer. The key to true understanding is not classification and differentiation of the spoken words or sounds, but the imagery evoked by the patterned aural-visual symbols. This observation appears to have particular application to a television commercial which projects a distinct pattern of compressed, fluid pictorial and aural images, submerging its technical 'content' and appealing directly to the viewer's psychic and social consciousness. In a very real sense, the viewer's critical faculties of classification and differentiation are drowned in patterns of imagery and symbols. Thus it is possible that, in skilled and practiced hands, the spoken words of a television commercial may appear to say one thing, while its pictorial and aural imagery conveys to the psyche of the viewer-audience something quite different. This observation is of some importance in evaluating many of the television commercials reviewed in this proceeding. In my view, in evaluating many of the advertisements challenged in this proceeding, the conventional wisdom of the psychology of learning is inadequate and needs to be complemented by the McLuhanian perspective.⁹⁴

The circuit court, reviewing his findings, cited his approach to interpreting meaning approvingly. The court noted that "[t]he Commission's right to scrutinize the visual and aural imagery of advertisements follows from the principle that the Commission looks to the impression made by the advertisement as a whole."⁹⁵

A similar approach should be taken in reviewing advertising to determine if express warranties have been made. The advertisement must be viewed as a whole, with the understanding that affirmations or promises about product quality or efficacy can be made not only by using specific words, but by presenting images that the consumer will reasonably adopt as part of his expectations of what the product will do.

B. The "Basis of the Bargain" Requirement

Under the Uniform Commercial Code, even though an advertising representation may constitute "an affirmation of fact or a promise," it does not become an express warranty unless it is "part of the basis of the bargain." The precise meaning and application of that term has long plagued courts and commentators trying to determine just what it is that the Code requires.⁹⁶

94. In re American Home Prods., 98 F.T.C. 136, 290-91 (1981).

95. American Home Prods. v. FTC, 695 F.2d 681, 688 (3d Cir. 1982).

96. For some differing opinions, see J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE 332-339 (2d. Ed. 1979); R. NORDSTRUM, LAW OF SALES §§ 66-68 (1970); Murray, "Basis of the Bargain": Transcending Classical Concepts, 66 MINN. L.R. 283 (1982) (comparing White & Summers with Nordstrum and coming up with a third view), discussed *infra* at notes 141-151 and accompanying text.

1. *Can An Advertisement Be "Part of the Basis of the Bargain"?*

The comments to the Code are helpful in easily disposing of the issue of whether representations in advertisements may constitute express warranties. Comment 2 to Section 2-313 provides that "the warranty sections . . . are not designed in any way to disturb those lines of case law growth which have recognized that warranties need not be confined . . . to sales contracts" Thus, courts have had little trouble finding that an advertisement, although not part of the written contract, can nevertheless create express warranty liability,⁹⁷ so long as it is "part of the basis of the bargain." However, in the vast majority of the cases, where representations in advertising were found to have created a basis for recovery, it is clear that the plaintiff had seen the ad prior to the purchase and often had been induced into making the purchase because of the representations made therein. Whether the plaintiff is actually required to have thus relied on the advertisement in order to recover on an express warranty theory has been the subject of inquiry by the commentators.

2. *Must the Buyer Rely on the Ad in Making the Decision to Purchase?*

The starting point of the analysis always seems to be a comparison of the Code with the Uniform Sales Law, its predecessor statute. The Uniform Sales Law provided in Section 12 that:

Any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon⁹⁸

The commentators take note of the fact that the word "reliance" does not appear in the Code definition of express warranty and that the concept evidenced by that term and by the term "induce" in the Uniform Sales Law has been replaced by the "part of the basis of the bargain" language in the Code.⁹⁹ The significance of that substitution remains unsettled in both the literature on the subject and in the courtroom.¹⁰⁰

Some courts expressly carried over the reliance requirement from the prior law and continued to insist that under the Code, the buyer must show that the representation induced the purchase of the product.¹⁰¹ In *Hagenbuch v. Snap-On Tool*

97. See *Scheuler v. Aamco Transmissions, Inc.*, 1 Kan. App. 2d 525, 528, 571 P.2d 48, 51 (1973)(specifically referring to comment 2). See also *Keith v. Buchanan*, 173 Cal. App. 3d, 13, 220 Cal. Rptr. 392, 398 (1985); *Hawkins Const. Co. v. Matthews Co.*, 190 Neb. 546, 564-65, 209 N.W.2d 643, 654 (1973); *Drier v. Perfection, Inc.*, 259 N.W.2d 496, 502 (S.D. 1977).

98. UNIFORM SALES ACT § 12 (1906).

99. It is useful to note as well that the drafters did include a reliance requirement under U.C.C. § 2-315 to establish an implied warranty of fitness for a particular purpose.

100. As early as 1955, Professor John Honnold wrote: "There remains the central question: What is the meaning of 'basis of the bargain'? Possibly for lack of any other meaningful standard, courts must employ the test whether buyer relied on the affirmation or promise. . . . But . . . the Code's rejection of the present [Uniform Sales Law] reliance language might well imply an intent to modify present law." 1 STATE OF NEW YORK, REPORT OF THE LAW REVISION COMMISSION, STUDY OF THE UNIFORM COMMERCIAL CODE 392-93 (1955).

101. For an examination of some of the early cases, see Note, "Basis of the Bargain" - What Role Reliance?, 34 U. PITT. L. REV. 145 (1972). The author of that note was particularly disturbed by a New Mexico case, *Stang v. Hertz Corp.*, 83 N.M. 217, 490 P.2d 475 (Ct. App. 1971), *rev'd. on other grounds*, 83 N.M. 730, 497 P.2d 732 (1972). The *Stang* court did not allow recovery to the executrix of a passenger in a car, rented from defendant, who suffered injuries resulting in death when a blowout caused the car to crash. The plaintiff sued on an express warranty theory based on a

Corp.,¹⁰² a federal district court sitting in New Hampshire held that the plaintiff, suing for personal injury on an express warranty that was allegedly created in a catalog, had the "burden of showing that he acted on the basis of the representations."¹⁰³ The plaintiff was struck in the eye by a chip from a hammer that was described in seller's catalog as meeting federal specifications.¹⁰⁴ When no evidence was introduced to show that the plaintiff had relied on the catalog description when he bought the product, the court dismissed the express warranty claim.¹⁰⁵

In *Ewers v. Eisenzopf*,¹⁰⁶ the Wisconsin Supreme Court seemed to take a different approach when it said that "the statutory language 'a basis of the bargain' does not require the affirmation to be the sole basis for the sale, only that it is a *factor* in the purchase."¹⁰⁷ Later in its opinion, however, the court favorably cited an opinion in an earlier case that described the appropriate test as "whether [the seller] made an affirmation of fact the natural tendency of which was to induce the sale and which *did in fact induce it*."¹⁰⁸

The Code addresses the reliance issue in comment 3 to Section 2-313 which provides: "No particular reliance . . . need be shown in order to weave [affirmations of fact made by the seller about the goods] into the fabric of the agreement." Despite this seemingly unequivocal language, many courts still find reliance to be a necessary element in establishing an express warranty. For example, in *Sessa v. Reigle*,¹⁰⁹ a federal district court interpreted comment 3 to mean that the drafters of the Code did not intend to require a "*strong* showing of reliance."¹¹⁰ But, the court nevertheless said that the "basis of the bargain" test is "essentially a reliance requirement."¹¹¹ The court held that statements made by the seller about his horse did not constitute an express warranty because the buyer had acted primarily on the advice of his own agent who had conducted an independent inspection.¹¹² Since the buyer did not rely

statement in the rental agreement that the vehicle was in good mechanical condition and an oral representation by defendant's agent that "you have got good tires." The court would not submit the question of whether an express warranty existed to the jury because there was no evidence that any members of the rental party relied on, or in any way considered, the terms of the rental agreement before agreeing to the rental, and because the oral representation was made after the car had been rented.

102. 339 F. Supp. 676 (D. N. H. 1972).

103. *Id.* at 680.

104. *Id.* at 677-78.

105. *Id.* at 680. See also *Overstreet v. Norden Laboratories, Inc.*, 669 F.2d 1286, 1291 (6th Cir. 1982) (applying Kentucky law)("A warranty is the basis of the bargain if it has been relied upon as one of the inducements for purchasing the product."); *Speed Fastners, Inc. v. Newsom*, 382 F.2d 395, 397 (10th Cir. 1967)(applying Oklahoma law)(an express warranty was not created by statements in an advertising brochure when there was no evidence that the actual purchaser of the product had relied on those statements); *Stamm v. Wilder Travel Trailers*, 44 Ill. App. 3d 530, 534, 358 N.E.2d 382, 385 (1976)(no express warranty created by an ad where there was no direct evidence on the issue of reliance); *General Supply and Equip. Co. v. Phillips*, 490 S.W.2d 913, 917 (Tex. Civ. App. 1972)(where one of the required elements of proof to recover money damages was ". . . that the injured party, in making the purchase, relied on the representations, affirmations of fact or promises . . .").

106. 88 Wis. 2d 482, 276 N.W.2d 802 (1979).

107. *Id.* at 488, 276 N.W.2d at 805.

108. *Id.* at 489, 276 N.W.2d at 805 (citing *Pritchard v. Liggett & Myers Tobacco Co.*, 350 F.2d 479, 487 (3d Cir. 1965), cert. denied, 382 U.S. 987 (1965), opinion amended, 370 F.2d 95, cert. denied, 386 U.S. 1009 (1966)).

109. 427 F. Supp. 760 (E.D. Pa. 1977).

110. *Id.* at 766.

111. *Id.* The same analysis is found in *Royal Business Machs. v. Lorraine Corp.*, 633 F.2d 34 (7th Cir. 1980)(applying Indiana law).

112. 427 F. Supp. at 767.

on the seller's statements in making his decision to purchase, such statements could not have been "part of the basis of the bargain."¹¹³

Other courts' opinions begin a discussion of the reliance issue by flatly stating that the Code no longer requires a showing of reliance in order to establish the existence of an express warranty.¹¹⁴ In *Interco, Inc. v. Randustrial Corp.*,¹¹⁵ the court dismissed defendant's argument that plaintiff could not recover on an express warranty theory because the plaintiff had failed to show that it had relied on a representation made in a catalog distributed by the defendant.¹¹⁶ In dismissing the argument, the court noted that Section 2-313 does not mention reliance and also specifically cited comment 2 to that section as evidence that "the concept of reliance as required in pre-UCC warranty cases was purposefully abandoned."¹¹⁷ After saying this, however, the court qualified its impact by stating that "the catalog advertisement or brochure must have at least been read . . . as the UCC requires the proposed express warranty be part of the basis of the bargain."¹¹⁸

3. Must the Advertisement Be Seen Prior to Purchase?

White and Summers, who are among the foremost commentators on the Uniform Commercial Code, cite approvingly the logic and conclusion of the court in *Interco, Inc. v. Randustrial Corp.*¹¹⁹ They read comment 3 to create a "presumption" that a statement made by the seller becomes "part of the basis of the bargain," which, without any further evidence of reliance by the buyer, will operate to survive the seller's motion for a directed verdict.¹²⁰ Once the seller introduces evidence of non-reliance, however, the buyer cannot get to the jury on the affirmation alone.¹²¹ In the case of an advertisement, the minimum proof necessary to qualify for the presumption that a seller's statements are "part of the basis of the bargain," would be that the buyer "knew of and relied upon the advertisement *in making the purchase*."¹²²

At the other end of the spectrum is Professor Robert J. Nordstrum.¹²³ Nordstrum

113. *Id.* at 766.

114. *See, e.g.*, *Hauter v. Zogarts*, 14 Cal. 3d 104, 115, 534 P.2d 377, 383, 120 Cal. Rptr. 681, 687 (1975) (However, the court did not need to decide the case on that basis because it found that the plaintiff had, in fact, read and relied on the representation of safety.); *Elanco Prods. Co. v. Akin-Tunnel*, 474 S.W.2d 789, 793 n.4 (Tex. Civ. App. 1971)(Reliance was really not at issue here either. Instead the court focused on what warranty had been made and whether it was breached or whether plaintiff had failed to act in accordance with instructions.).

115. 533 S.W.2d 257 (Mo. Ct. App. 1976).

116. *Id.* at 261-62.

117. *Id.* at 261.

118. *Id.* at 262. Similarly, in *Massey-Ferguson, Inc. v. Laird*, 432 So. 2d 1259, 1261 (Ala. 1983), the court wrote that a showing of reliance was not required under the Code. But when discussing whether a warranty that was not delivered at the time of the sale could be "part of the basis of the bargain," the court pointed out that, in fact, the plaintiff knew of its existence prior to delivery, since it was discussed in the sales agreement and he was generally familiar with the type of warranty given on such machines. *Id.* at 1261.

119. J. WHITE & R. SUMMERS, *supra* note 53, at 336.

120. *Id.* at 334-35.

121. *Id.* at 335 n.36.

122. *Id.* at 336. White and Summers write that "no statement in an advertisement would normally qualify for the presumption" since the comment 3 language refers to affirmations of fact made during a "bargain."

123. R. NORDSTRUM, *HANDBOOK OF THE LAW OF SALES* (1970).

admits to the uncertainty of the cases as to whether an unread advertisement may constitute an express warranty, but he believes that those which would permit that result reach the preferable answer and the one more consistent with the Code's intent.¹²⁴ Nordstrum arrives at the conclusion because he sees the role of warranty law historically as protecting those who suffer injury. His emphasis is on determining whether the seller's product has caused the injury and he writes "any statements made by the seller designed to induce the public to buy his product are relevant in making this determination."¹²⁵ For Nordstrum, the "basis of the bargain" includes not only the "dickered"¹²⁶ terms of the sale, but the item purchased as well, and the seller's statements help to determine just what it is that was sold.¹²⁷

Comment 7 to Section 2-313 appears to address the issue of whether an express warranty can constitute part of the basis of the bargain even though it is made (or heard or seen) *after* the transaction seemingly has been consummated. Comment 7 provides that:

The precise time when words of description or affirmation are made or samples are shown is not material. The sole question is whether the language or samples or models are fairly to be regarded as part of the contract. If language is used after the closing of the deal (as when the buyer when taking delivery asks and receives an additional assurance), the warranty becomes a modification, and need not be supported by consideration if it is otherwise reasonable and in order (Section 2-209).¹²⁸

The cases use varying analyses to find the existence of post-sale warranties. In *Jones v. Abriani*,¹²⁹ the court held that promises of repair made by the seller after the sales contract had been entered into constituted express warranties because they induced the buyer to accept goods that the buyer might otherwise have rejected.¹³⁰ In *Autzen v. John C. Taylor Lumber Sales, Inc.*,¹³¹ a post-sale survey of a used boat was held to create an express warranty for the buyer. The *Autzen* court explained that even though the survey did not induce the formation of the contract, it might have "induce[d] and [been] intended by the Seller to induce Buyer's satisfaction with the agreement just made, as well as lessen [the Buyer's] degree of vigilance in inspecting the boat prior to acceptance."¹³² And, in *Downie v. Abex Corp.*,¹³³ statements concerning a product safety feature, made after delivery of the goods, constituted express warranties because the statements were made to "promote future sales." The court found this to be especially true since defendant

124. *Id.* at 209.

125. *Id.*

126. This reference comes from comment 1 to § 2-313 which provides, "'Express' warranties rest on 'dickered' aspects of the individual bargain, and go so clearly to the essence of that bargain that words of disclaimer in a form are repugnant to the basic dickered terms."

127. R. NORDSTRUM, *supra* note 123, at 209.

128. U.C.C. § 2-313, comment 7.

129. 169 Ind. App. 556, 350 N.E.2d 635 (1976).

130. The court treated this as a modification of the contract and cited § 2-209 of the Code. 169 Ind. App. at 570, 350 N.E.2d at 645.

131. 280 Or. 783, 572 P.2d 1322 (1977).

132. *Id.* at 790, 572 P.2d at 1326. The court also favorably cited and followed the Nordstrum analysis of the concept of "bargain" (described *infra*, note 139 and accompanying text). *Id.* at 789, 572 P.2d at 1326.

133. 741 F.2d 1235 (10th Cir. 1984).

had sent brochures discussing the safety feature of the product to the plaintiff for distribution to the plaintiff's customers.¹³⁴

White and Summers take a very narrow view of the comment 7 reference to post-sale warranties. They would only recognize the creation of post-sale warranties in those situations where statements are made in "face-to-face dealings" while the "deal is still warm,"¹³⁵ so as to ensure a bilateral agreement to modify the contract during the time the buyer still has the right to return the goods.¹³⁶ For White and Summers, it is dispositive of the issue that the discussion of post-sale warranties in comment 7 refers to Section 2-209 which, they note, contemplates an "agreement modifying a contract."¹³⁷ Advertising simply would not qualify since "one could hardly attribute that bilateral connotation to an advertisement"¹³⁸

Nordstrum, on the other hand, believes that the concept of "bargain" adopted by the Code transcends the limitations imposed by traditional notions of contract formation. He writes: "A 'bargain' is not something that occurs at a particular moment in time, and is forever fixed as to its content; instead, it describes the commercial relationship between the parties in regard to this product."¹³⁹ Thus a post-sale statement might still be said to be made "during a bargain." If a court was nevertheless convinced that the bargain had been completed prior to the statements being made, those statements could constitute a modification of the agreement. Nordstrum evades the problem seen by White and Summers in Section 2-209, by finding it reasonable to assume that the buyer would have agreed to any statement expanding his warranty protection.¹⁴⁰

Dean John E. Murray, Jr. does an in-depth analysis of both the White and Summers and the Nordstrum positions and comes away unsatisfied.¹⁴¹ He disagrees completely with the White and Summers analysis, finding their reasoning "faulty"¹⁴² and their arguments "unpersuasive."¹⁴³ He is uncomfortable with the fact that they seem unwilling to recognize an expanded concept of bargain that goes beyond

134. *Id.* at 1240. See also *Bigelow v. Agway, Inc.*, 506 F.2d 551 (2d Cir. 1974)(applying Vermont law). In this case, post-delivery statements by defendant's salesman that a product would permit hay to be baled with a higher moisture level than previously represented, constituted an actionable modification of the warranty since the salesman's visit was to promote the sale of the product. *Id.* at 555-56.

135. J. WHITE & R. SUMMERS, *supra* note 53, at 338.

136. Their rationale for the time requirement is that failure to reject the goods within a reasonable time after delivery or tender constitutes an acceptance which then precludes rejection. (U.C.C. §§ 2-602(1), 2-606(1)(b), 2-607(2)). Revocation of acceptance must also occur within a reasonable time after the buyer discovers or should have discovered the grounds for it. (U.C.C. § 2-608(2)).

137. White and Summers also point out that § 2-209 also provides that any oral modification of a contract for goods costing over \$500 must meet the statute of frauds under § 2-209(3) or constitute a waiver of the statute under § 2-209(4). This, too, they argue, would limit the number of situations where post-sale express warranties would be created.

138. J. WHITE & R. SUMMERS, *supra* note 53, at 338. The entire quotation is actually "one can hardly attribute that bilateral connotation to an advertisement that is not published until after the sale." However, one must assume that White and Summers' previous comments about reliance (see *supra* note 122 and accompanying text) would be applicable to a situation where an advertisement was published prior to a sale and not seen by the buyer until after the deal was consummated.

139. R. NORDSTRUM, *supra* note 123, at 206.

140. *Id.* at 207.

141. See Murray, "Basis of the Bargain": Transcending Classical Concepts, 66 MINN. L. REV. 283 (1982). Murray's excellent analysis also includes a discussion of the statutes and the case law.

142. *Id.* at 308.

143. *Id.* at 311.

traditional contract principles.¹⁴⁴ He applauds Nordstrum for doing just that, but believes Nordstrum fails to supply the "kind of guidance which courts and lawyers can use."¹⁴⁵ Murray is concerned that the Nordstrum analysis becomes "so mired in factual diversity that it suggests a non-analysis."¹⁴⁶

Murray's solution is to accept an expanded notion of the bargain concept, and to set forth as a workable test to determine its operation "*the reasonable expectations of the buyer*."¹⁴⁷ Murray argues that the "basis of the bargain" concept must be seen in the context of Article 2's overriding purpose to reflect the agreement of the parties as their "bargain-in-fact" rather than the traditional contract notion of the "bargained-for-exchange."¹⁴⁸ Thus, when comment 3 refers to "affirmations of fact made by the seller about the goods *during a bargain*," that time frame would transcend the traditional concept and protect any expectations created, "regardless of when the statements were made or when the buyer learned of them."¹⁴⁹

Murray's analysis does not address all the issues that may arise when express warranties are alleged to have been created in advertising representations. The examples he uses, and his rationale for concluding that post-formation statements or pre-formation statements unknown to the buyer at the time of contracting are "part of the basis of the bargain," suggest that the buyer has become aware of the affirmation *prior* to the product's failure to perform as warranted.¹⁵⁰ Thus he speaks of "lost opportunities" and "unfair surprise" when the product does not perform as *expected*, and even reliance "in attempting to use the goods pursuant to the statement, resulting in personal injury or economic loss."¹⁵¹

Moreover, even if Murray did mean to include representations that the buyer was not aware of until after product failure, the test, with its emphasis on the expectations of the buyer (even with this expanded concept of "bargain"), may still not lead to the correct result. Murray's emphasis on the buyer is misplaced. Public policy, marketing conditions, and the underlying rationale of warranty law as established by the Code demand that our focus be placed instead on the *seller*.

III. A NEW ANALYSIS—STRICT "CLAIM" LIABILITY

Under a strict "claim" liability theory, any representation made in advertising¹⁵² that is determined to be an affirmation of fact or promise would constitute an express warranty, regardless of whether it was seen or heard by a particular consumer prior to the time his cause of action arose.¹⁵³ Support for this position can be found

144. *Id.* at 309.

145. *Id.* at 317.

146. *Id.*

147. *Id.*

148. *Id.* at 289-91.

149. *Id.* at 318.

150. *Id.* at 321-23.

151. *Id.* at 322.

152. For purposes of this analysis, advertising shall be defined as any message or information for distribution or communication to the general public, concerning goods sold to the public, prepared or paid for by the seller.

153. One case taking a similar position was *Winston Indus. v. Stuyvesant Ins. Co.*, 55 Ala. App. 525, 317 So. 2d 493 (1975), *review denied*, 294 Ala. 775, 317 So. 2d 500 (1975), which upheld an action on a written product warranty

in comment 4 to Section 2-313, which provides that "the whole purpose of the law of warranty is to determine what it is that the seller has in essence agreed to sell"¹⁵⁴ Thus, when a representation about a product is made in a media available to *any* consumer, that representation becomes a part of the basis of the bargain for *all* consumers since it describes what it is the seller intends to sell.

For example, assume that in a television commercial aired during the Super Bowl, the seller represents that its pickup truck is especially built to pull heavy loads and shows the truck moving more than 5000 pounds of weight. Further assume that a consumer who has not seen the ad and is otherwise unaware of the representation, buys or owns the company product and, when he attempts to move a similar heavy load, strips the gears on the truck. If the company refuses to repair the truck, the buyer should be able to sue on the express warranty created by the advertising,¹⁵⁵ regardless of the fact that he did not see the ad and that he was unaware of the seller's claims prior to the occurrence of the incident causing the damage. The plaintiff's recovery is based on the theory that the advertiser had made an affirmation for everyone to see, with the intent to induce the public at large into buying the advertised product.¹⁵⁶

This position is consistent with comment 3 to Section 2-313, which provides:

In actual practice, affirmations of fact made by the seller about the goods during a bargain are regarded as part of the description of those goods; hence no particular reliance on such statements need be shown in order to weave them into the fabric of the agreement. Rather, any fact which is to take such affirmations, once made, out of the agreement requires clear affirmative proof. . . .¹⁵⁷

Under a "strict claim liability" analysis, the advertiser would not be required to affirmatively prove that the affected consumer was unaware of, or did not rely on, the advertised representations. Instead, the required proof would be that the advertiser *did not intend* the representation to be a part of the basis of *that particular consumer's* bargain. Since the presumption would be that an advertisement is intended for all consumers, the advertiser would be required to show that he intended to *exclude* particular consumers from the benefit of the promises or affirmations made in the ad.

on a mobile home. The warranty was never physically received by the buyer and he was unaware of it. The court's holding, however, may be limited by the facts of the case. The defendant admitted that it regularly put the warranty in every mobile home it built and sent to a dealer with the assumption that the warranty would be delivered to the ultimate consumer. 55 Ala. App. 525, 529-30, 317 So. 2d 493, 496. Furthermore, the court took notice of the fact that the bill of sale from the dealer to the purchaser included the statement "New trailers bear usual factory [sic] warranty," and that work previously had been performed on the trailer by the defendant as if a warranty was in existence. *Id.*

154. U.C.C. § 2-313, comment 4.

155. The buyer may have to sue on an express warranty theory, since any implied warranties may be disclaimed or the goods may, in fact, be merchantable (fit for the ordinary purpose). See U.C.C. § 2-314.

156. Why else would anyone spend \$550,000 for 30 seconds of airtime?

Professor Douglas Whaley comes to the same conclusion on the basis of general contract principles. He sees the buyer as a third-party beneficiary of the warranties made by the seller to the public. Citing the RESTATEMENT (SECOND) OF CONTRACTS §§ 133-135, he writes, "Since the promisee (the public) buys in reliance on these representations and expects anyone injured by their breach to sue successfully for damages suffered, the injured buyer is an intended beneficiary and can enforce the seller's promise." D. WHALEY, WARRANTIES AND THE PRACTITIONER 39 (1981).

157. U.C.C. § 2-213, comment 3.

One way an advertiser might do this is to show that the advertisement was intentionally run in a specific market to limit the audience to whom the representations were made. Assume, for example, an automobile advertiser runs an ad touting the dependability of his product. The 30-second mini-drama shows a husband awakened in the middle of a rainy, miserable night by his pregnant wife saying "It's time!" He rushes to the garage, jumps in his car, but it won't start. Frantic, he goes next door and wakes up his friendly neighbor, who happens to own the advertiser's product. When they get in the neighbor's car, it starts right up and off they go to the hospital! The advertiser finishes the spot with the words, "It always starts when you really need it."

Further assume, however, that the advertiser purposefully runs spots like this one *only* in warm weather climates, because the advertiser does not want to vouch for the car's starting abilities in sub-zero temperatures. Under this analysis, a consumer in Florida, for example, gets the benefit of the express warranty made in the ad, regardless of whether or not she saw the ad or was aware of its content. By airing the ad in that market, the seller intended to direct the promise or affirmation to her and intended it to be part of the basis of *her* bargain. A consumer in Minnesota, however, where the ad was not run, who did not see the ad and was unaware of its content until after his alleged injury, would not have a cause of action for breach of an express warranty based on a representation made in that ad. The advertiser did not intend to make the promise to him and the representation was not a part of the basis of *his* bargain.¹⁵⁸

The Code specifically says that the seller's intention is not at issue in determining whether an express warranty has been created. Section 2-313(2) provides:

*It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.*¹⁵⁹

However, the position taken in this Article is not inconsistent with a careful reading of that section of the Code. The denial of the relevance of the seller's intent is in reference to the nature and content of the representation made.¹⁶⁰ As previously discussed, whether words or descriptions or the "net impression" of an ad create a warranty is a question of fact.¹⁶¹ Under the Code formulation, and the position urged here, the trier of fact would look at the ad and determine what claims, if any, have been made. Whether or not the advertiser intended to make those claims, and thus create an express warranty, is not at issue in that determination.

158. If, while visiting Florida, the Minnesota plaintiff, had seen the ad (and had allegedly relied on it in making his purchase), he would have an express warranty claim in what Nordstrum calls "the easy case." NORDSTRUM, *supra* note 123, at 208. Even a court using a traditional reliance test would come to that conclusion. If the advertiser did not want that to occur, he could have qualified the warranty by stating something like "In warm weather climates, it always starts when you need it."

159. U.C.C. § 2-313(2) (emphasis supplied).

160. Hence, the seller need not use "formal words" to create a warranty.

161. See *supra* note 63.

For example, assume a TV commercial shows a man wearing the advertiser's watch while washing his car. A few children then engage him in some roughhousing that turns into a raucous water fight. Later that evening, the man is seen wearing the same watch accompanying a beautiful woman to the opera. The advertiser's intent was to show that the *styling* of the watch permitted it to be worn for both recreational and formal activities. However, whether representations were made about the *durability* of the watch, including an affirmation that it was waterproof, would be determined by the trier of fact looking at the "net impression" of the ad, without regard to the advertiser's intent to make such claims. If the fact finder determines that those claims have been made, they become part of the basis of the bargain for *all* consumers, unless the advertiser can prove otherwise, pursuant to the test outlined above.¹⁶²

IV. THE POLICY RATIONALE

The policy rationale for "strict claim liability" is really no different from that for "strict tort liability"¹⁶³ or the reasoning behind abolishing the privity requirement when plaintiff sues under warranty law to recover for economic loss.¹⁶⁴ The contemporary structure and operation of the free enterprise marketing and distribution system justify placing the responsibility for losses incurred as a result of product failure on the marketers of those products that fail. Advertisers run mass marketing appeals on television and radio, in magazines and newspapers, and through the mails, in an attempt to induce consumers to buy their products on the basis of the direct and implicit promises made in their advertisements. The advertiser intends for its messages to motivate a product choice that results in a financial gain to the advertiser. When product failure prevents the consumer from getting the benefit of the seller's representations about the product, ordinary notions of fairness would insist that the seller not reap the financial benefits resulting from that consumer's purchase.

Warranty law is primarily a method of determining the appropriate way of allocating loss for product failure between a buyer and seller. From both a social and economic policy perspective, such losses are more properly borne by the seller. It is the seller who is in the best position to detect and prevent product failure. The spectre of warranty liability provides an incentive to control and eliminate the risks involved if a product fails to perform as promised, through effective quality control.¹⁶⁵ Moreover, it is the seller who is in the best position to spread the costs of the loss

162. The advertiser may also revert to disclaimers in the sales agreement of any statements or representations that do not appear in written documents that are furnished at the time of purchase. Such documents would likely include a "merger" clause which would prohibit the introduction of parol evidence to establish an express warranty allegedly created in advertisements. An analysis of the effect of disclaimers (U.C.C. § 2-316) and the parol evidence rule (U.C.C. § 2-202) is beyond the scope of this article. For a discussion of this specific issue, see Note, *The Effect of Contract Provisions on Express Advertising Warranties: Community Television Services, Inc. v. Dresser Industries, Inc.*, 25 S.D.L. REV. 143 (1980).

163. See *supra* notes 3 and 14-30 and accompanying text.

164. See *supra* notes 39-44 and 49 and accompanying text.

165. Birnbaum, *Unmasking the Test for Design Defect: From Negligence [To Warranty] to Strict Liability to Negligence*, 33 VAND. L. REV. 593, 596 (1980).

incurred, through insurance and price adjustments when product failures nevertheless occur.¹⁶⁶

The theory urged in this Article, also provides an incentive, when those products are advertised, to make only those promises the seller is willing to stand behind to only those purchasers it intends to include as the beneficiaries of those promises. By including those consumers who will admit to not relying on or even seeing the advertisements among those who may successfully maintain an action, an unnecessary issue, and one which may very well have fostered exaggeration or even perjury, will be removed from the proceedings. On the other hand, given the pervasive nature of advertising, who's to say that a consumer has not, at least subliminally, been subjected to the seller's message?

Perhaps the most forceful argument for the adoption of "strict claim liability," however, is that the advertiser, through voluntary statements made to the general public, has established the standards against which its product should be judged. If the product cannot meet those standards, the advertiser need not, and in fact, should not, set them up.

166. *Id.*

